89-1325

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DAVID F. GARDNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

The judgment order of the lower Court violates the standard for barring a retrial set forth in *Oregon v. Kennedy*, 456 U.S. 667.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

DAVID F. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, David F. Gardner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on November 16, 1989.

OPINIONS BELOW

The Court of Appeals for the Third Circuit affirmed the order and opinion of the District Court by judgment order. The opinion of the United States District Court for the Western District of Pennsylvania is unreported and is reprinted in the appendix, p. 9a, *infra.*

JURISDICTION

Petitioner was charged by indictment in the United States District Court with violating federal criminal statutes. Judgment of conviction was entered by the District Court on February 10, 1989.

On Petitioner's appeal, the Third Circuit on November 16, 1989 entered judgment affirming the conviction. A timely petition for rehearing was filed and denied by order entered December 18, 1989.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. 1254(1) and Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE

This case involves Petitioner's challenge to the granting of a mistrial when requested by his co-defendant, for statements elicited by the government which were prejudicial only to the co-defendant.

In July, 1988, Petitioner was one of five (5) individuals indicted for their participation in a conspiracy to buy and sell counterfeit United States currency.

Co-defendant, James Wickstrom, had prior to trial, secured an order suppressing certain evidence which tended to show an association with a white supremacist group known as the Aryan Nations.

At an in-chambers conference, the Honorable Glenn E. Mencer, District Judge, set forth certain guidelines and rules to be followed to prevent a violation of the suppression order. The Court advised all counsel that this trial was not to be a political trial.

With the examination of Victor Rizzo, a witness for the government and a co-defendant who had entered a plea of guilty, counsel for the government began a course of conduct which necessitated the granting of a mistrial.

Obviously displeased with the testimony being elicited from the witness Rizzo, the government asked the witness if he wanted to withdraw his guilty plea. This was denied.

Counsel for the government had to be ordered not to speak to Mr. Rizzo, his son, or attorney, due to the manner and attitude he conveyed to them, which was one of intimidation.

Government counsel also engaged in facial gesticulations, rolling his eyes and making noises to further express his displeasure with his witness. He also shook his head and ultimately threw his pen down on the desk, all indications that he did not believe the witness and he was lying.

Finally, the government called Ralph E. King, an A.T.F. agent, to testify. In the course of his testimony, Agent King identified the fact that some of the counterfeit money was being taken to a meeting of the Aryan Nations. Agent King went on to identify this as a conservative, right wing, paramilitary organization in Hayden Lake, Idaho. This directly violated the rules and guidelines set by the Court regarding the suppressed testimony.

The Court indicated a belief that perhaps this particular answer was suggested to the witness as a way of getting that testimony into evidence.

Petitioner did not request a mistrial; the co-defendant did. In deciding the motion, the Court found that the witness had, in fact, been instructed by counsel to use the descriptive terms employed by the agent in his testimony.

The Court then granted a mistrial as to both defendants despite the fact that Petitioner never moved for one. Subsequently, Petitioner went to trial alone after the District Court denied his Motion to Dismiss, while

the co-defendant Wickstrom filed an immediate appeal from the denial of his Motion to Dismiss.

Petitioner was subsequently convicted and sentenced, on April 25, 1989.

Notice of Appeal to the Third Circuit was timely filed. The conviction was affirmed by judgment order entered November 16, 1989. App. p. 1a. A Petition for Rehearing was timely filed and was denied by order entered December 18, 1989. App. p. 8a.

REASONS FOR GRANTING THE WRIT

The resolution by this Court of the issue presented would advance and clarify areas of great import, particularly the bounds of the double jeopardy clause as well as the conduct of a trial in relation thereto. This filing was also compelled because the result violates a principle of the double jeopardy clause. The retrial of a citizen because the previous trial was going badly for the government. Petitioner, therefore, asks that certiorari be granted for the following reasons.

THE JUDGMENT ORDER OF THE LOWER COURT VIOLATES THE STANDARD FOR BARRING A RETRIAL SET FORTH IN *OREGON v. KENNEDY*, 456 U.S. 667

The double jeopardy clause of the Fifth Amendment "protects a criminal defendant from repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667 at 677 (1982). This protection includes the "valued right to have his trial completed by a particular tribunal." *Wade v. Hunter*, 336 U.S. 684 at 689 (1949).

When the Court grants a defense motion for a mistrial, the applicable standard for barring a retrial is found in *Oregon, supra*, at 676. There this Court said:

> "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for

> a mistrial, may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." [1]

Thus, there must be a showing that the government intended to provoke the defendant into moving for a mistrial. *Oregon*, at 679.

Inasmuch as intent is subjective in nature, the facts and circumstances surrounding the conduct must be examined in considering a double jeopardy motion. *Oregon*, 456 U.S. at 679-680.

The Court below determined that even though Petitioner did not actually make a motion for mistrial he joined in the motion of the co-defendant.

Petitioner argued below that the objective facts and circumstances of this case show that the government "goaded" Wickstrom into asking for a mistrial.

The conduct of the United States Attorney, taken as a whole, particularly his facial gesticulations, throwing his pen down on the desk, shaking his head, and violating his assurance to the Court that he had no intention of explaining to the jury what Aryan Nations was, all presented circumstances forcing Wickstrom to move for a mistrial.

The culmination of these actions, that is, the testimony of Agent King, which violated the assurance given to the Court by the United States Attorney, that no explanation of Aryan Nations would be offered, all point to the intentional conduct designed to force a mistrial. This conclusion is further buttressed by the admission of the United States Attorney that he told the agent that he could describe this group as a conservative, right-wing, paramilitary group, which directly violated the assurance given to the Court.

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[1] See also *United States v. Curtis*, 683 F.2d 769 at 774 (3rd Cir. 1982).

Also, since the order referred to did not affect Petitioner, nor did the testimony of Agent King, the "manifest necessity" for declaring a mistrial as to the Petioner was not present.

The Court has the authority to discharge a jury from rendering a verdict, whenever, in its opinion, in view of all circumstances, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated. *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824).[2]

This testimony was clearly referring to only the co-defendant Wickstrom. The order which the Court entered only referred to Wickstrom. In addition, there was another alternative available to the lower Court which would have ensured that Petitioner received the full protection of the double jeopardy clause. This alternative is the same one which the Court used in *United States v. Alford*, 516 F.2d 941. In that case, the government apparently mixed up a draft Indictment and the actual indictment which was returned by the Grand Jury. The Grand Jury had returned a seven (7) count, twenty-one (21) Overt Act Indictment against Alford and his co-defendant. The co-defendant received an Indictment which contained one (1) count and fifteen (15) overt acts while Alford received the correct Indictment. As trial began, the Court advised the jury in it's opening instructions that the trial was based on a seven (7) count Indictment.

The following day, counsel for the co-defendant raised an objection regarding the difference between the two indictments. The Court, on its own Motion, granted a mistrial as to both defendants. They appealed on the basis of double jeopardy. The appeal of Alford, who had been given the correct Indictment, was sustained.

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[2] See also *Arizona v. Washington*, 434 U.S. 497 (1978); *Illinois v. Somerville*, 410 U.S. 458 (1973).

The Court reasoned that, as to the co-defendant, there was manifest necessity for a mistrial, since he had not even been arraigned on the correct charges. However, no such necessity applied to the defendant, Alford, and his trial should have continued. *United States v. Rivera*, 801 F.2d 593, CA2 (1986).

The statements of Agent King were specifically in reference to remarks and actions of Wickstrom. The controversy in this trial centered around Wickstrom's political and/or religious beliefs. Furthermore, the government's rationale for eliciting this testimony centered on proving Wickstrom's intent to sell counterfeit money, a count in which Petitioner was not named. Thus, the trial as to Petitioner should have proceeded, as no manifest necessity for a mistrial existed.

As a result, the judgment entered below is violative of the standard set by this Court, where a mistrial is declared, and a retrial occurs. Hence, the retrial of the instant case breached the double jeopardy clause of the Fifth Amendment. Therefore, Petitioner requests that a Writ of Certiorari issue to review the judgment of the Court of Appeals.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3291

THE UNITED STATES

vs.

JAMES P. WICKSTROM, VICTOR F. RIZZO, a/k/a
DOC RIZZO, THOMAS MARTIN RYAN,
DAVID F. GARDNER, a/k/a SARGE,
HARRY CHARLES LUTTNER,

DAVID F. GARDNER,

Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 88-114)
District Judge: Glenn E. Mencer

Submitted Under Third Circuit Rule 12(6)
November 8, 1989

Before: MANSMANN and GREENBERG, *Circuit Judges* and GAWTHROP, *District Judge* *

(Filed Nov. 16, 1989)

MEMORANDUM OPINION OF THE COURT

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* Honorable Robert S. Gawthrop, III of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

MANSMANN, *Circuit Judge.*

In this appeal the main issue we are asked to determine is whether the district court abused its discretion by denying Gardner's motion to dismiss the case on the grounds that a new trial violated the double jeopardy clause of the fifth amendment. Because the district court properly concluded under the rule of *Oregon v. Kennedy*, 456 U.S. 667 (1982) that the prosecutor did not intentionally provoke the defense counsel into asking for a mistrial and because we find the other issues to be without merit, we will affirm the judgment of conviction and order of sentence of the district court.

I.

The appellant, David F. Gardner, was indicted with four other people, namely James P. Wickstrom, Victor F. Rizzo, Thomas Martin Ryan, and Harry Luttner, of conspiracy to possess and buy counterfeit currency, a violation of 18 U.S.C.A. § 473 (West 1976). In addition, Gardner was charged with purchasing counterfeit currency with intent to pass the currency in violation of 18 U.S.C.A. § 474.

Prior to trial, co-defendant James Wickstrom secured an order suppressing certain evidence linking the defendants to a white supremacist group known as the Aryan Nations. During the trial, Wickstrom's defense counsel made several mistrial motions after certain statements or questions by the prosecutor brought out evidence that Aryan Nations was a "conservative, right-wing, paramilitary organization," contrary to the pretrial motion. After Wickstrom's motion for mistrial, the district court concluded that the public's interest in fair trials indicated that a new trial was necessary and granted the motion for mistrial as to both Wickstrom and Gardner. Although Gardner contended that he had not joined in the motion, his counsel joined in the sidebar discussions concerning the motion. Moreover, the

district court concluded that the manifest necessity standard required that the motion be granted as to both Wickstrom and Gardner.

Gardner moved for dismissal of the indictment on the grounds of double jeopardy. The district court denied his motion after finding that the prosecutor did not provoke defense counsel into requesting a mistrial, and scheduled a new jury trial which resulted in a conviction. Gardner appeals, challenging the sufficiency of the evidence which led to his conviction as well as the district court's conclusion that the prosecutor did not intentionally goad the defense counsel into moving for mistrial. Gardner also contests the district court's finding that he had failed to take responsibility for his actions and, therefore, was not entitled to a two point reduction in offense level for sentencing purposes.

We can only reverse the district court's findings of prosecutorial misconduct for double jeopardy purposes if we determine that the findings were clearly erroneous. *United States v. Curtis*, 683 F.2d 769 (3d Cir. 1982). A district court's declaration of a mistrial on the basis of manifest necessity is reviewable for an abuse of discretion. *Arizona v. Washington*, 434 U.S. 497 (1978).

As to Gardner's claim that there was insufficient evidence to convict him, we view the evidence in a light most favorable to the government and determine whether there is substantial evidence on the record to uphold the jury's verdict. Only if the district court's finding that Gardner had failed to accept responsibility for his actions is clearly erroneous will we vacate the sentence and remand for the application of a lower offense level.

II.

Gardner's first contention is that the district court erred by failing to dismiss the indictment after the first trial ended in a mistrial because the double jeopardy

clause of the fifth amendment precluded the retrial. We note at the outset that the district court properly applied the rule in *Oregon v. Kennedy*, 456 U.S. 667 (1982) to determine whether the mistrial was the result of intentional provocation on the part of the prosecutor. The Court in *Oregon v. Kennedy* reasoned that "the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy in all circumstances." 456 U.S. at 673. Thus, there eixsts an exception to the rule that where the defendant moves for a mistrial there is no double jeopardy bar to retrial. Consequently, the double jeopardy clause "does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." 456 U.S. at 674, *citing United States v. Dinitz*, 424 U.S. 600, 611 (1976).

Here, the district court concluded as a matter of fact that the prosecutor did not intentionally provoke the defense counsel into moving for a mistrial. Having reviewed the record, we find that the district court's determination was not clearly erroneous. Although the prosecutor's actions may be termed as overzealous, even conduct which can be viewed as harassment or overreaching "does not bar retrial . . . absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." 456 U.S. at 676.

Gardner also claims that it was improper for the district court to have granted a mistrial as to him when the complained of activity only involved his co-defendant, James Wickstrom. We disagree. One of the offenses for which Gardner was charged involved conspiracy, an offense that holds all co-conspirators liable for the actions of the conspiracy. Although the statements by the government's witness implicated Wickstrom as a "white supremacist", by the nature of the offense, the district

court was justified in concluding that a manifest necessity required that a new trial be granted for Gardner as well.[1] *See Wade v. Hunter*, 336 U.S. 684 (1949) (" 'manifest necessity' standard provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining the public's inteerst in fair trials designed to end in just judgments").

Gardner's third argument is that the district court erred by failing to grant his motion for acquittal. In this manner, Gardner is essentially attacking the sufficiency of the evidence upon which the jury reached a conviction. Our standard of review of a challenge to the sufficiency of the evidence is very circumscribed. Thus, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Aguilar*, 843 F.2d 155, 157 (3d Cir. 1988).

Gardner contends that the testimony of several witnesses indicated he did not aid and abet the conspiracy. The statements relied on by Gardner—which were to the effect that Rizzo did not want Gardner to participate in the transfer because he had a big mouth—were rebutted on redirect by the prosecution.[2] Thus, the jury was faced

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[1] The district court explained its concerns as follows:

> Our concern for possible juror bias resulting from political considerations relative to white supremacists who were allegedly anti-Semitic and anti-Black led us to conclude that there was a manifest necessity to grant a mistrial in the instant criminal case.

United States v. Gardner, Crim. No. 88-114 (W.D. Pa. December 6, 1988), slip op. at 3.

[2] On redirect the government witness Ryan testified:

> Q. And nobody told him he was out of it; he thought he was in, didn't he?

[Continued]

with a question of whether Gardner aided and abetted the conspiracy; a question which was decided in the affirmative.

Gardner's final argument is that the district court erred at sentencing by not granting him a two point decrease for accepting responsibility for his actions. Under § 3E1.1(a) of the Sentencing Guidelines, "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, [the court should] reduce the offense level by 2 levels." Sentencing Guidelines, § 3E1.1(a). Gardner states that § 3E1.1(a) *mandates* a reduction in the offense level if the defendant demonstrates acceptance of responsibility. We need not reach the issue of whether the section is mandatory or discretionary, because we note point 5 of the commentary provides that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation." Sentencing Guidelines, § 3E1.1, Commentary note 5.

Although it is true that Gardner made incriminating statements to government agents, these statements were mare after his co-defendant's arrest and were intended to minimize his role in the scheme. In addition, he stated he had never intended to participate in the counterfeiting operation. In light of these facts, the district court could properly determine that Gardner did not ac-

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[2] [Continued]

A. Well, I'm sure he did.

[Objection]

Q. I'll rephrase it. Did he say he was in?

A. He said that he was, he was given a percentage to pass, you know.

Q. And did he say who told him he was in?

A. Um, Doc.

Appendix of Appellant at 744-45.

cept responsibility and was not entitled to a two point reduction. We will not reverse this finding since, viewing the record, we do not find it to be clearly erroneous.

III.

For the aforementioned reasons, we will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3291

UNITED STATES OF AMERICA

vs.

JAMES P. WICKSTROM, *et al.*,

DAVID F. GARDNER,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, *Circuit Judges* and GAWTHROP, III,* *District Judge*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT
/s/ Carol Los Mansmann
Circuit Judge

Dated: December 18, 1989

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* District Judge Gawthrop voted only on panel rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 88-114

UNITED STATES OF AMERICA,
Plaintiff

v.

JAMES P. WICKSTROM, DAVID F. GARDNER
a/k/a SARGE,
Defendants

MEMORANDUM

This Court has for consideration Motions by the defendants seeking to have the Indictment in the above-captioned case dismissed as a result of a mistrial declared during the trial that commenced on October 3, 1988. The defendants assert that to place the defendants again on trial would constitute double jeopardy and violate their Fifth Amendment rights.

Generally a second trial of a defendant is barred by double jeopardy only if the prosecutor intended to provoke defendant to move for mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). Prosecutorial conduct that might be viewed as harrassment or over-reaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial.

We have carefully reviewed the proceedings of the initial trial and do here make a finding of fact that it

was not the intention of the prosecutor in this case to cause a mistrial nor to "goad" the defendant Wickstrom into moving for a mistrial.

Defendant Gardner contends that although he had previously made during the trial a number of motions for mistrial, he did not join in the Motion for Mistrial which was granted by this Court. Therefore, he argues now that the government, as to him, is barred from a retrial.

Although this Court was of the definite view that defendant Gardner was joining in the mistrial motion due to his attorney's participation at side bar and in chambers during the time we were considering the motion, we are of the view that the "manifest necessity" standard is met here. *See*, e.g., *Arizona v. Washington*, 434 U.S. 497, 509 (1978); *Illinois v. Somerville*, 410 U.S. 458, 463 (1973). Mr. Justice Story formulated such a standard in *United States v. Perez*, 9 Wheat 579, 580, 6 L.Ed. 165 (1824) when he stated:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . . But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.

Our concern for possible jurors bias resulting from political considerations relative to white supremacists who were allegedly anti-Semetic and anti-Black led us to conclude that there was a manifest necessity to grant a mistrial in the instant criminal case. Believing that our conclusion was supported on the record by the "high degree" of necessity which is required, we determine that "the public's interest in fair trials designed to end in just judgments," *Wade v. Hunter*, 336 U.S. 684, 689 (1949), requires here a further trial as to both defendants.

Accordingly, this Court will deny the Motions to Dismiss the Indictment and will reschedule the trial.

An appropriate order will be filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 88-114

UNITED STATES OF AMERICA,
Plaintiff

v.

JAMES P. WICKSTROM, DAVID F. GARDNER
a/k/a SARGE,
Defendants

ORDER

AND NOW, this 6th day of December, 1988, after careful consideration and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED that Defendants' Motions to Dismiss the Indictment are DENIED.

/s/ Glenn E. Mencer
United States District Judge